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No. 90-1928

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

ANTOINETTE RUSSO and MILDRED MALONEY,
Petitioners,

vs.

CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, SCOTT POHLMAN, CARL FROST, RICK MARTIN and KEN FROST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, CARL FROST, RICK MARTIN AND KEN FROST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an alleged violation of a State Appellate Court injunction, which was contrary to the then existing and present state law, precludes entitlement to qualified immunity in an action brought pursuant to 42 USC Section 1983.

2. Whether any genuine issue of material fact precluded the Court of Appeals from affirming the grant of summary judgment regarding Plaintiff's allegation that a warrant was required to conduct the administrative inspection and seizure of the video draw poker machines.

3. Whether a State Appellate Court injunction, which is contrary to then existing and present state law, precludes a grant of summary judgment based on qualified immunity as to an allegation that an administrative search of a liquor permit holder's premises, which was conducted without a warrant, was in violation of the Fourth Amendment.

4. Whether Plaintiff failed to present sufficient evidence to establish the existence of a custom, policy or practice required to impose municipal liability.

PARTIES

Omitted under authority of Rule 29.1 of the Rules of the Supreme Court of the United States.

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OPINIONS BELOW

Respondent accepts Petitioner's statement regarding Opinions Below and incorporates by reference the Opinions Below appearing in the Appendix to Petitioner's Petition for Writ of Certiorari at pages A-1 through B-17, inclusive.

JURISDICTION

Respondents acknowledge that the United States Court of Appeals for the Sixth Circuit issued its Opinion and Judgment on March 5, 1991. On May 24, 1991 Petitioner filed with this Honorable Court an application for extension of time within which to file a Petition for Writ of Certiorari. On May 24, 1991 Justice Stevens signed an Order extending the time for Petitioner to file said Petition for Writ of Certiorari to and including June 13, 1991.

On June 13, 1991 Petitioner filed its Petition for Writ of Certiorari with this honorable Court.

These Respondents were served on June 26, 1991 with a copy of Petitioner's Petition for Writ of Certiorari. Respondents filed a Notice of Receipt of Service to evidence this date of service. Respondents timely Brief in Opposition follows.

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1). Respondents acknowledge this Honorable Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1) to review the decision of the United States Court of Appeals for the Sixth Circuit in this matter.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents agree that 42 U.S.C. Section 1983 and the Fourth and Fourteenth Amendments are relevant to the matter at bar. However Respondents assert Ohio Revised Code Section 4301.10 which provides in pertinent part as follows is also relevant:

> "(A) the Department of Liquor Control shall:
>
> (4) enforce Chapters 4301 and 4303 of the Revised Code, and the Rules and Orders of the Board, the Director, and the penal laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor; . . .
>
> (6) inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301 and 4303 of the Revised Code . . . .
>
> (7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor . . . ".

STATEMENT OF THE CASE

Respondents Carl Massullo, Beaver Township, John Does 1-7, Carl Frost, Rick Martin and Ken Frost, hereinafter the Beaver Township Defendants, wish to draw the attention of the Court to Petitioners continued reference to all Defendants below as Respondents without differentiation as to the conduct of Defendant Pohlman, as opposed to the conduct of the Beaver Township Defendants. As noted by the Court of Appeals for the Sixth Circuit in its decision, the Beaver Township Defendants are differently situated from a factual standpoint than Respondent/Defendant Scott Pohlman.

Respondent Pohlman is a liquor control agent for the Ohio Department of Liquor Control. The Beaver Township Defendants are police officers and the then acting police chief for Beaver Township. The John Does are assumed to be additional Ohio Department of Liquor Control Agents or Internal Revenue Agents.

Respondents also object to Petitioners continued citation to matters in their Petition for Writ of Certiorari which were not part of the record below.

In *Garono v. State,* 37 Ohio St. 3d (1988) the Ohio Supreme Court affirmed in part and reversed in part the injunction upon which Plaintiff places so much reliance. The Court in *Garono, supra,* wrote as follows:

> "To approve the injunction granted by the Trial Court would prevent the police from ever being able to seize, impound, or confiscate the appellees poker machines in the future if they were used in an unlawful manner. This would, in effect, give appellee a license to violate the law without fear of reprisal. For these reasons, we find that the injunction is improper in that it is too broad and thereby interferes with law enforcement." *Garono, supra* at 174.

The Ohio Supreme Court limited the injunction in *Garono* to reflect that video draw poker machines could be seized only when there is evidence the machines had been used in a manner so as to "establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit." (R.C. 2915.02(A)(2)(5)).

The Ohio Supreme Court in *Garono, supra* held, for the first time, that mere possession of video draw poker machines, which were held to be a gambling device *per se,* in *Mills-Jennings of Ohio, Inc. v. Ohio Department of Liquor Control,* 80 Ohio St. 2d 95 (1982) were not illegal absent additional evidence that the machines had been used in violation of Revised Code §2915.01, *et seq.* The Ohio Supreme Court held that mere possession of the video draw poker machines, although gambling devices *per se,* was not sufficient to establish criminal liability. The Court ruled that a further showing of the games being utilized in an effort to generate profit from gambling was a necessary element of the offense.

Petitioner points to the concession by the Ohio Department of Liquor Control in *Mills-Jennings of Ohio, supra,* to the effect that mere possession of the video draw poker machines was not a violation of the Ohio law. This statement is correct and in fact the Ohio Department of Liquor Control modified its policy subsequent to *Mills-Jennings of Ohio, supra* so that video draw poker machines would be seized by liquor control agents only upon a showing that the machines had been operated for profit. Therefore, the subsequent conduct of the Ohio Department of Liquor Control was consistent with the Ohio Supreme Court's eventual holding in *Garono, supra.*

Petitioner makes reference to an alleged stipulation that "seizure of the video games was wholly unnecessary for any proper law enforcement purpose." (Petition For

Certiorari at page 7.) This statement is unsupported by the record. A review of *Garono, supra* demonstrates there was no such stipulation. Rather the parties stipulated that no machine had been introduced into evidence, but instead expert testimony and representations of the machines had been introduced into evidence in lieu of the actual machine. No stipulations were made in the case at bar.

Petitioner states at page 8 of its Petition for Certiorari that respondent Massullo wrote a letter to the Department of Liquor Control "admittedly with no basis in fact.". A review of the record in the case at bar, demonstrates that this statement is unsupported by the record. The deposition testimony of Defendant Massullo reveals that the letter written to the Ohio Department of Liquor Control was based on anonymous telephone calls indicating that payoffs were being made at Petitioner's tavern. While a previous investigation by Beaver Township had revealed no illegal gambling, Defendant Massullo because of the Garono injunction felt it necessary to turn over the anonymous tips of the illegal payoffs to the Ohio Department of Liquor Control for their investigation.

In response to this letter from Defendant Massullo Respondent Pohlman, after being authorized by his superiors, began an investigation of Petitioner's tavern for evidence of payoffs on the video draw poker machines. Petitioner alleges that Pohlman's testimony regarding receiving payoffs was rebutted by his own records. This statement is clearly a distortion of the record. While the record reflects that Respondent Pohlman's records did not *confirm* the payoffs the records clearly did not refute evidence of a payoff. Pohlman testified to receiving payoffs.

Petitioner also states that Respondents Pohlman, Massullo, Frost, Martin and Frost met and agreed to conduct an armed raid on the Stagecoach Restaurant and

Lounge. This statement is also a complete distortion of the record. The record reflects that Respondent Massullo was approached by Respondent Pohlman and asked to meet with Respondent Pohlman and other liquor control agents and with agents of the Internal Revenue Service at the Youngstown FBI office. The record further shows that Respondent Massullo had no part in planning the raid on the Stagecoach Restaurant and Lounge and was only informed of the raid the day on which it was to occur. Respondents Frost, Martin and Frost had absolutely no part in the pre-raid preparation or planning. They were instructed by Defendant Massullo, on the day of the raid, to accompany the Ohio Department of Liquor Control agents into the Stagecoach Restaurant and Lounge for the purposes of providing security. Respondent Pohlman requested security from the Beaver Township Police Department due to his observation of weapons and fights inside the Stagecoach Restaurant and Lounge. Respondent Pohlman testified he saw weapons and fights inside of the Stagecoach Restaurant and Lounge during his investigation. On this basis the Beaver Township defendants accompanied the Ohio Department of Liquor Control agents into the Stagecoach Restaurant and Lounge for the sole purpose of providing security for the unarmed liquor control officers and Internal Revenue Agents.

On April 16, 1987 a raid was conducted by the Ohio Department of Liquor Control, with the Beaver Township Defendants acting as security, for the purpose of closing out the Ohio Department of Liquor Control's investigation of the Stagecoach Restaurant and Lounge. While Respondents acknowledge they had no warrant to conduct this raid Respondents assert that the Stagecoach Restaurant and Lounge as a public establishment engaged in the business of selling intoxicating liquor, which is recognized as a highly

regulated industry subject to government supervision, was subject to administrative searches and in fact was open to the public so that no warrant was necessary for entry.

Petitioner continues to make numerous allegations concerning the scope and manner of the search conducted by the Ohio Department of Liquor Control and as to the actions of the Beaver Township Defendants in providing security. While these issues of fact remain for litigation in the District Court these matters are not fact upon the record.

Petitioner at page 11 of its Petition for Certiorari states that Respondents seized the two video draw poker machines in violation of the Garono injunction. However, as the record clearly shows the seizure was made by the Ohio Department of Liquor Control and not by the Beaver Township Defendants. Further, based on Respondent Pohlman's statements that he received payoffs on the video draw poker machines the seizure of the machines was proper under the Garono injunction as affirmed by the Ohio Supreme Court.

Petitioner states at page 11 of its Petition for Certiorari that there was no evidence to support the criminal charges against Petitioners. However a review of the Judgment Entry dismissing the Complaints against Petitioners demonstrates that the failure to prove the profit element necessary for a violation was because two of the machines had been improperly marked and could not be admitted into evidence and that the third machine, although properly marked, was broken and could not be cleared, precluding a demonstration it was operated in violation of the law.

Therefore Petitioners' allegation that the lack of credibility as to Respondent Pohlman was the basis of the dismissal is without merit and is contrary to the record.

The Sixth Circuit Court of Appeals held, that as a pervasively regulated industry, no warrant was required to conduct an administrative search of the Stagecoach Restaurant and Lounge. However the Court ruled that the administrative search was subject to the Fourth Amendment's time, scope and manner restrictions, especially because no such restrictions were incorporated into the Ohio Revised Code or the Ohio Department of Liquor Control's administrative rules. The Court of Appeals ruled, that while no warrant was required, the scope and manner of the search must meet the requirements of the Fourth Amendment.

The Court ruled that as to Respondent Pohlman, who admittedly believed that more than mere possession of the gambling devices was required to establish liability, the question as to whether he knew his allegation of receiving payoffs was a falsehood was a question of fact not proper for resolution on a Motion for Summary Judgment. However the Court also ruled, as to the Beaver Township defendants, that they were entitled to rely upon Pohlman's assertion of receiving payoffs to establish probable cause for the seizure of the machines. The Court held that the question of whether the scope and manner of the search was reasonable under the Fourth Amendment was a question of fact. The Court held that Beaver Township Defendants could be liable under a "team rationale" theory for the actions of the Ohio Department of Liquor Control agents in their administration of the search.

Petitioner states at page 16 of its Petition for Certiorari that the Court of Appeals found that there was "sufficient evidence from which a jury could conclude that Respondent Massullo was the final and ultimate policy maker for Respondent Beaver Township, . . .". However, this statement is clearly a distortion of the record. The Sixth Circuit Court of Appeals held there

was "... some evidence from which a jury could reasonably conclude that Massullo could set policy" (Judgment Entry at page A-15).

Notwithstanding Petitioners' statements to the contrary Petitioners introduced absolutely no evidence as to the existence of any custom, policy or practice on behalf of Respondent Beaver Township. Rather Petitioner relies on attempting to establish Respondent Massullo's authority to set day to day policy and argues because Respondent Massullo can make policy any decision he makes is therefore policy.

SUMMARY OF ARGUMENT

1. The Sixth Circuit Court of Appeals has consistently held, and held in this case, that public officials are only entitled to qualified immunity when exercising discretionary decision making authority.

The opinion of the Court of Appeals below, and the cases cited by the Court in its Opinion, as well as other Sixth Circuit Court of Appeals cases, clearly demonstrate that the Sixth Circuit Court of Appeals does not hold that qualified immunity may be granted to a public official who is acting pursuant to a ministerial duty, as opposed to discretionary decision making. Petitioners' statements to the contrary in their Petition for Certiorari are clearly in error and are not the law of the Sixth Circuit.

The Mahoning County Court of Appeals injunction, which Petitioner alleges prohibited the seizure of the video draw poker machines, was contrary to the law of the Ohio Supreme Court both before and after *Garono v. State*. This injunction was invalid as being contrary to law.

2. The Sixth Circuit Court of Appeals held that a public official could be held to have violated "clearly established law" where he knew or reasonably should have known that the action he took violated the Plaintiff's constitutional rights, notwithstanding the lack of an authoritative decision to that effect by the United States Supreme Court, the Court of Appeals from that district, or the highest court for that state. The Court held that actual knowledge that the conduct violated the constitutional rights of the Plaintiff was a sufficient basis for liability notwithstanding the lack of such a definitive decision. The Beaver Township Defendants were entitled to rely upon the statements of Respondent Pohlman, an Ohio Department of Liquor Control agent, as to his receipt of payoffs in making their determination

to provide security to the Ohio Department of Liquor Control. Notwithstanding the innuendos attempted to be created by Petitioner at pages 34 and 35 of its Petition for Certiorari there is absolutely no evidence in the record that the Beaver Township Defendants knew or should have known that the statements made by Respondent Pohlman were falsehoods. A review of the record demonstrates a total lack of evidence that the Beaver Township Defendants knew Pohlman's statements to be false.

Petitioner failed to carry its burden under Rule 56 of the Federal Rules of Civil Procedure to present sufficient evidence to create a genuine issue of material fact. Petitioners' attempt to draw innuendos from language in the cases of *Garono v. State, supra* and *State v. Skalada,* Case No. 84-1976 (Youngstown Muni Ct 1984), unreported, are clearly not evidence admissible under Rule 56(e) of the Federal Rules of Civil Procedure and are insufficient to create a genuine issue of material fact warranting a denial of Defendant's Motion for Summary Judgment. Likewise this lack of evidence cannot be a basis for overruling the grant of Summary Judgment or the affirmation thereof by the Sixth Circuit Court of Appeals.

3. The Beaver Township Defendants did not conduct the search and seizure in the case at bar, but only provided security for the Ohio Department of Liquor Control agents.

Notwithstanding this fact the Sixth Circuit Court of Appeals held that the Beaver Township Defendants could be held liable if the scope of the search conducted by the Ohio Department of Liquor Control was unreasonable under a "team rationale" theory. The Sixth Circuit Court of Appeals noted the existence of the injunction goes to the appropriateness of the seizure and is not relevant as to whether the scope of the search itself was reasonable.

Defendants assert there is no conflict with *Bissonette v. Haig,* 800 F.2d 812 (8th Cir. 1986). *Bissonette* was a case appealing the granting of a Motion to Dismiss. The question in *Bissonette, supra* was whether a good cause of action had been stated. The Court of Appeals construing the right of privacy in light of the societal expectations and assumptions then in existence ruled that a good cause of action had been set forth. The reasonableness of the search and seizure are questions of fact which the Sixth Circuit Court of Appeals remanded to the District Court. Therefore, any issues relating to the reasonableness of the search are questions of fact for determination at trial.

4. Plaintiff failed to present evidence sufficient to create a genuine issue of material fact as to whether the conduct of Respondent Massullo constituted a municipal policy sufficient to impose liability on Respondent Beaver Township.

ARGUMENT

QUESTION FOR REVIEW NO. 1.: WHETHER AN ALLEGED VIOLATION OF A STATE APPELLATE COURT INJUNCTION, WHICH WAS CONTRARY TO THE THEN EXISTING AND PRESENT STATE LAW, PRECLUDES ENTITLEMENT TO QUALIFIED IMMUNITY IN AN ACTION BROUGHT PURSUANT TO 42 U.S.C. §1983.

Petitioner correctly cites to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) as the general standard governing qualified immunity available to governmental officials in actions brought under 42 U.S.C. §1983. Pursuant to *Harlow, supra*, governmental officials "performing discretionary functions" are entitled to qualified immunity if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow, supra* at 818. The standard of *Harlow, supra* was refined in *Anderson v. Creighton*, 483 U.S. 635 (1987) where this Honorable Court held that in order to be "clearly established" a right must be "sufficiently particularized" so that a reasonable official would understand that what he is doing violates that right. *Anderson, supra.*

Petitioner attempts to create a conflict between the Circuit Courts of Appeal regarding whether qualified immunity can be extended to officials who are performing only ministerial acts as opposed to exercising discretionary decision making powers.

Respondents assert a resolution of this alleged conflict is not necessary to a ruling on the case at bar. Contrary to Petitioner's statements contained on pages 18 and 19 of the Petition for Certiorari the Sixth Circuit Court of Appeals does not hold that qualified immunity may be extended to an official who is performing a

ministerial duty. In fact the Sixth Circuit Court of Appeals in its decision in the case at bar wrote as follows:

> "Qualified immunity is available to officials performing discretionary functions unless the contours of the right that the governmental official allegedly violated were sufficiently clear that a reasonable official would have understood that what he is doing violates that right." Citation omitted (Opinion of the Sixth Circuit Court of Appeals appearing at page A-6 of the Appendix.)

In fact, the Sixth Circuit Court of Appeals held as early as 1971 in *Estate of Burke v. Ross,* 438 F.2d 230 (6th Cir. 1971) that persons performing ministerial duties are not entitled to qualified immunity. Most recently in *Boretti v. Wiscomb,* 20 S.C.R. 10, 1991 U.S. Appeals Lexis 6045 (6th Cir. 1991) the Sixth Circuit wrote as follows:

> "Complying with the doctor's prescription or treatment plan is a ministerial function, not a discretionary one. See *Estate of Burke v. Ross,* 438 F.2d 230, 235 (6th Cir. 1971) for this reason, we don't believe Defendant Wiscomb's Motion for Summary Judgment should be granted on the basis of qualified immunity."

Clearly the Sixth Circuit Court of Appeals has consistently held that qualified immunity is not available to those performing ministerial duties, but is only available to those performing discretionary decision making functions. Therefore, Petitioner's First Question for Review does not present a conflict between the Circuits and Petitioner's Petition for Writ of Certiorari should be denied.

In the case at bar Petitioner alleges that Defendants violated a ministerial duty by disobeying the injunction issued in *Garono v. State, supra.* However, as previously noted this injunction was issued by the Mahoning

County Court of Appeals and was contrary to the law of the State of Ohio as announced by the Ohio Supreme Court. Additionally, the injunction in *Garono, supra*, was affirmed in part and reversed in part by the Ohio Supreme Court. The injunction as narrowed by the Ohio Supreme Court was consistent with the actions of the Beaver Township Defendants in the case at bar.

Petitioners seek to rely on the proposition of law that an injunction must be obeyed until it is vacated by order of court. While Respondents acknowledge this general proposition of law, Respondents assert that said injunction did not constitute clearly established law, but rather was contrary to clearly established law at the time this cause of action arose. Respondents assert a state court injunction which is contrary to state law should not form the basis of a denial of qualified immunity premised on a federal civil rights claim.

Additionally, this Honorable Court ruled in *Worden v. Searls*, 121 U.S. 14 (1886) that where an injunction is unwarranted as a matter of law, sanctions for its violation cannot be upheld. Also in *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855) this Honorable Court ruled that an injunction violation cannot be enforced once the basis for the injunction is overruled.

Therefore, the Mahoning Court of Appeal's injunction being unwarranted as a matter of law, even at the time of its issue, cannot be enforced and should not be the basis of a denial of qualified immunity.

Respondents have a statutory duty in the State of Ohio to uphold the law of the State of Ohio. Respondents in the case at bar were effectively enjoined from upholding the law of the State of Ohio as it then existed. In fact, the Ohio Supreme Court in *Garono v. State* realized the inappropriateness of this injunction when it wrote as follows:

> "To approve the injunction granted by the trial court would prevent the police from ever being able to seize, impound, or confiscate the appellee's poker machines in the future if they were used in an unlawful manner. This would, in effect, give appellee a license to violate the law without fear of reprisal. For these reasons, we find the injunction is improper and that it is too broad and thereby interferes with law enforcement." *Garono, supra* at 174.

Respondent Massullo in the case at bar was not violating a ministerial duty, but rather was exercising his discretionary powers as acting chief of police which require him to enforce the laws of the State of Ohio.

Respondents assert the Sixth Circuit Court of Appeals correctly interpreted and applied the law of the State of Ohio and of the United States in holding that Respondents were entitled to qualified immunity. Further there is clearly no conflict between the circuits which would justify granting petitioner's Writ for Certiorari based on Question Presented for Review Number 1.

QUESTION FOR REVIEW NO. 2. WHETHER ANY GENUINE ISSUE OF MATERIAL FACT PRECLUDED THE COURT OF APPEALS FROM AFFIRMING THE GRANT OF SUMMARY JUDGMENT REGARDING PLAINTIFF'S ALLEGATION THAT A WARRANT WAS REQUIRED TO CONDUCT THE ADMINISTRATIVE INSPECTION AND SEIZURE OF THE VIDEO DRAW POKER MACHINES.

While Petitioner attempts to frame Question for Review No. 2 in terms of whether a governmental official who has actual knowledge he is violating a constitutional right is entitled to qualified immunity; Question for Review No. 2 is clearly not directed at that issue.

The Sixth Circuit Court of Appeals held that despite the absence of a definitive decision holding the alleged conduct unlawful that: "however, in the context of this case, Plaintiff's arguments persuade us that Pohlman could not reasonably have believed that the mere prsence of the draw poker machines inside a liquor establishment was enough to justify seizure of the machines and criminal charges." (Opinion of the Sixth Circuit at pages A-12, A-13.)

While in an appropriate case this Honorable Court may wish to decide what level of actual knowledge of illegality or belief of illegality is sufficient to strip a government official of qualified immunity, absent a definitive decision on point, Respondents submit the issue is not before this Honorable Court on appeal. Respondents have not appealed the Court of Appeals findings that Pohlman's alleged actual knowledge stripped him of qualified immunity. Absent an appeal by Respondent Pohlman on this issue Respondents assert the Sixth Circuit's holding that Pohlman's actual knowledge stripped him of qualified immunity renders Petitioner's Second Question for Review moot.

In reality Petitioner's Second Question for Review asks this Honorable Court to reweigh the facts as alleged by Petitioner. In the case at bar the Sixth Circuit Court of Appeals held that the Beaver Township Defendants were relying on the assertion of Respondent Pohlman as a law enforcement officer that an offense had occurred. Pursuant to this Honorable Court's ruling in *United States v. Hensley,* 469 U.S. 221 (1984) an officer of one law enforcement agency is entitled to rely upon the assertions and representations of a second law enforcement agency. Actions taken in reliance upon the information obtained from a second law enforcement agency, even if inaccurate, will not strip the official of qualified immunity absent actual knowledge of its falsity.

Petitioner's allegation of conflict between the circuits is not supported by any citation case law.

Viewing the conduct of the Beaver Township Defendants from the required objective view point demonstrates that the Beaver Township Defendants were entitled to qualified immunity.

Plaintiff attempts to create an issue of fact regarding whether the Beaver Township Defendants knew of any alleged falsity by Respondent Pohlman in his assertions of receiving a payoff. Petitioner at pages 34 and 35 of the Petition for Certiorari attempts to create an issue of material fact. However, a review of the matter set forth on pages 34 and 35 demonstrates there is no genuine issue of material fact regarding whether the Beaver Township Defendants knew that Respondent Pohlman's assertions were false. Even construing the information contained on pages 34 and 35 most strongly in Petitioner's favor demonstrates that these matters are not admissible under Rule 56(e) of the Federal Rules of Civil Procedure in opposition to a Motion for Summary Judgment. Further a review of the record demonstrates

that Petitioner submitted absolutely no evidence upon which a finding could be based that the Beaver Township Defendants knew that Respondent Pohlman was untruthful regarding the allegations of a payoff.

In fact, there has been no finding that Respondent Pohlman was untruthful regarding the allegation of a payoff.

Petitioner's allegation that the Sixth Circuit precluded the Plaintiff under the Doctrine of Qualified Immunity from presenting evidence to the jury regarding the fact that the Beaver Township Defendants knew Respondent Pohlman had lied regarding the allegation of payoffs is patently untrue. A review of the Sixth Circuit's Opinion demonstrates this falsity. Further, Petitioners presented absolutely no evidence admissible under Rule 56(e) of the Federal Rules of Civil Procedure which would create a genuine issue of material fact on this issue.

Therefore, as a matter of law and on the facts at bar, Petitioner's Second Question for Review should be answered against Petitioner. There is no conflict between the Circuits and no genuine issue of material fact as to the Beaver Township Defendants' knowledge regarding the assertion of a payoff.

QUESTION FOR REVIEW NO. 3. WHETHER A STATE APPELLATE COURT INJUNCTION, WHICH IS CONTRARY TO THE THEN EXISTING AND PRESENT STATE LAW, PRECLUDES A GRANT OF SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY AS TO AN ALLEGATION THAT AN ADMINISTRATIVE SEARCH OF A LIQUOR PERMIT HOLDER'S PREMISES, WHICH WAS CONDUCTED WITHOUT A WARRANT, WAS IN VIOLATION OF THE FOURTH AMENDMENT.

Petitioner at page 37 of its Petition states that Respondents Massullo, Frost, Martin and Frost conducted the search and seizure in this case. However, the record demonstrates that Massullo, Frost, Martin and Frost only provided security for the Ohio Department of Liquor Control and the Internal Revenue Agents who actually conducted the search and seizure in this matter.

Notwithstanding this factual distinction Petitioner argues that the holding of the Sixth Circuit is in conflict with the holding of *Bissonette v. Haig,* 800 F.2d 812 (8th Cir. 1986). However, *Bissonette, supra,* was a case involving a Motion to Dismiss. As stated by the court in *Bissonette, supra,* "We have before us only the question whether the Complaint states a claim, and a complaint need not negative a qualified immunity defense." *Bissonette, supra* at 813, Citations omitted. The language quoted from *Bissonette* by Petitioner was used by the court in the context of deciding whether a claim for relief had been stated. The case of *Bissonette, supra,* has absolutely no relevance to the issue of qualified immunity as the case is not a qualified immunity case. The court in *Bissonette* ruled that the word "unreasonable" implies that the term is to be judged against what society understands to be unreasonable at the point in time. What is unreasonable is to be decided against a backdrop or matrix of societal expectations and

assumptions. Assuming *arguendo,* the correctness of the statement in *Bissonette,* Defendants assert that this language creates no conflict with the Sixth Circuit Court of Appeals ruling in this case. In the case at bar the Sixth Circuit Court of Appeals reversed the summary judgment as to whether the search conducted was reasonable. The Court held that the reasonableness of the search was a question of fact to be addressed at trial. The court further held that the Beaver Township Defendants, if the search was unreasonable, could be held liable for the unreasonable search pursuant to a "team rationale" theory. The court held that the Beaver Township Defendants, by not intervening, could be held liable for the allegedly unreasonable search conducted by the Ohio Department of Liquor Control.

Assuming *arguendo,* that the injunction would be relevant to whether the search was reasonable, such an issue is a question of fact to be addressed on remand by the District Court. Again while Defendants do not believe this injunction is relevant to the issue of reasonableness of the search, Defendants assert the issue is properly before the District Court on remand. The State Appellate Court injunction was clearly contrary to the law of the State of Ohio as it existed at that time and was partially reversed by the Ohio Supreme Court. The Sixth Circuit Court of Appeals did not refuse to take the injunction into consideration in construing the reasonableness of the search. The Sixth Circuit Court of Appeals ruled that the reasonableness of the search is a question of fact to be addressed at remand. Therefore, whether the injunction should or should not be considered in evaluating the reasonableness of the search has not be adjudicated and is not properly before this Honorable Court.

Petitioner's discussion of the warrant requirement does not appear directed at the entry into the Stagecoach Restaurant and Lounge which was held

lawful by the Sixth Circuit Court of Appeals as an administrative inspection of a liquor establishment pursuant to *Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970). However, Petitioner seems to allege that the scope of the search was unreasonable and that its duration was unreasonable. As previously stated the Sixth Circuit Court of Appeals has held that these are issues of fact proper for the District Court's consideration on remand.

Therefore, Respondents assert that Question for Review No. 3 should be answered adversely to the Petitioner and that issues relating to the reasonableness of the search are properly issues for trial on remand as held by the Sixth Circuit Court of Appeals. Therefore, Petitioner's Petition for Certiorari should be denied as to this issue.

QUESTION FOR REVIEW NO. 4. WHETHER PLAINTIFF FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH THE EXISTENCE OF A CUSTOM, POLICY OR PRACTICE REQUIRED TO IMPOSE MUNICIPAL LIABILITY.

Petitioner at pages 43 and 44 of its Petition for Certiorari states: "In this case United States Court of Appeals for the Sixth Circuit explicitly held that Petitioners had presented sufficient evidence that Respondent Massullo, acting chief of police of Respondent Beaver Townships, was the final policy maker of the township." (Petition for Certiorari at pages 43 and 44.) However, contrary to Petitioner's statement the United States Court of Appeals for the Sixth Circuit held in this case: "Based on Massullo's testimony that he had final control over day-to-day police matters and that he sometimes made policy without submitting his decisions to the township Board of Trustees, there is some evidence from which a jury could reasonably conclude Massullo could set policy." (Opinion of the Sixth Circuit at page A-15, emphasis added.)

Clearly the Sixth Circuit Court of Appeals did not hold that sufficient evidence had been presented to find that Defendant Massullo was the final policy maker of the Township.

Assuming *arguendo* that Defendant Massullo was the final policy maker on certain issues Petitioner's argument is essentially that as the final policy maker any action or decision that Defendant Massullo made was municipal policy. Respondents assert that *Pembauer v. City of Cincinnati,* 475 U.S. 469 (1986) cannot be read so broadly. As stated by this Honorable Court in *Pembauer, supra*: "We hold that municipal liability under Section 1983 attaches where—and only where—a deliberate choice to follow a course of action is made among various alternatives by the official or officials

responsible for establishing final policy with respect to the subject matter in question. *Pembauer, supra* at 483-484.

The court in *Pembauer* clearly held that not every action of the municipal policy maker is municipal policy.

In the case at bar the Sixth Circuit Court of Appeals held, as did District Court that Petitioner had failed to submit sufficient evidence to demonstrate the existence of a custom, policy or practice on behalf of defendant Beaver Township. As noted by the Sixth Circuit Court of Appeals: "In this case Plaintiffs have failed to even articulate what they perceive to be deliberate and discernable policy, much less offer evidence to establish the existence of such policy." (Opinion of the Sixth Circuit Court of Appeals at page A-15.)

Pursuant to *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) a party opposing a Motion for Summary Judgment has the burden of creating a genuine issue of material fact by submitting evidence admissible pursuant to Rule 56(e) of the Federal Rules of Civil Procedure such that a reasonable jury could find in favor of the non-moving party. In the case at bar Petitioner has failed to submit any evidence in support of its allegation of the existence of a custom, policy or practice. (*Celotex, supra* at 322-323.)

The record demonstrates that Petitioner has failed to submit any evidence of a municipal custom, policy or practice. Pursuant to *Celotex, supra* and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1985), a plaintiff may not defeat a properly supported Motion for Summary Judgment without offering evidence from which a reasonable jury could find a verdict in his favor.

In the case at bar Petitioner's argument would result in *Pembauer* being a rule of absolute liability so that any action by a policy maker would be automatically an official custom, policy or practice resulting in liability.

Further, in the case at bar an application of this rule would result in vicarious liability for the municipality in violation of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1977) where this Honorable Court declined to impose *Respondeat Superior* liability on a municipality. An application of the rule advanced by Petitioner would result in a municipality being vicariously liable for the actions of the liquor control agents who conducted the search. Pursuant to the Sixth Circuit Court of Appeals ruling the Beaver Township Defendants may be liable under a "team rationale" theory for the actions of the Ohio Department of Liquor Control agents if their search was unreasonable and exceeded the bounds of the Fourth Amendment. While such a team rationale approach may have validity as to individual officers if they witnessed and did not intervene so as to prevent a constitutional violation such a "team rationale" theory has no application to a municipal defendant. If liability is to be imposed upon the Beaver Township Defendants based on a "team rationale" then any imposition of liability on the municipal defendant is clearly vicarious liability akin to *Respondeat Superior*. Such an approach was rejected by this Honorable Court in *Monell, supra*.

Therefore, Respondents assert that Petitioner failed to submit sufficient evidence to allow a reasonable jury to find the existence of a custom, policy or practice upon which municipal liability can be based. Further, Respondents assert that to impose liability against Defendant Beaver Township on the record before the Court is akin to *Respondeat Superior* liability. Respondents assert the "team rationale" theory has no application to a municipal defendant.

Therefore, Respondents assert that petitioner's Fourth Question Presented for Review should be answered against Petitioner and that Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing arguments and authorities Respondents assert that Petitioner's Petition for Writ of Certiorari should be denied and that the judgment of the Sixth Circuit Court of Appeals should be affirmed in its entirety.

Respectfully submitted,

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